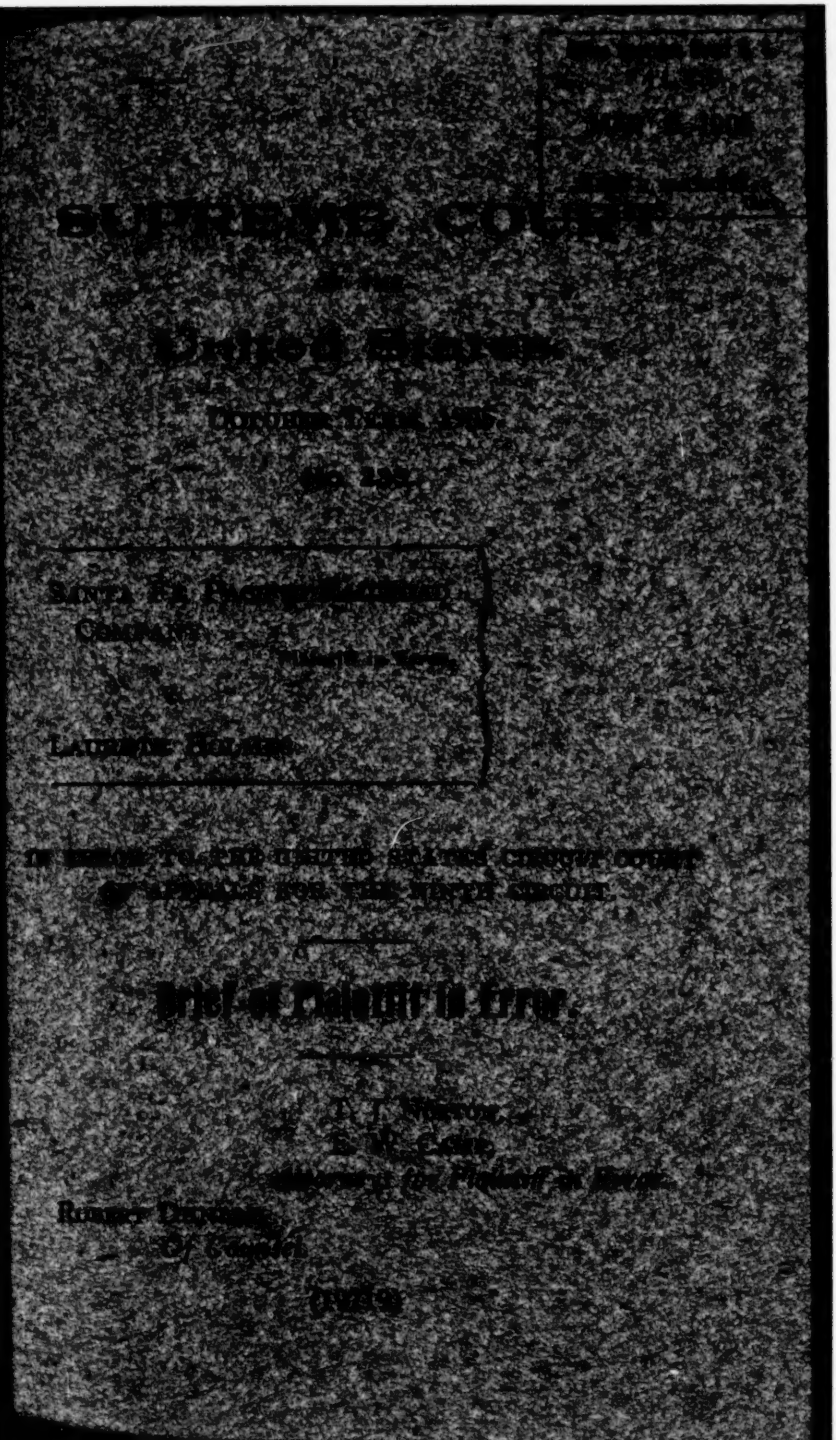

(19719)

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1905.

NO. 235.

SANTA FE PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

v.

LAURETE HOLMES.

In Error to the United States Court of Appeals for the Ninth Circuit.

BRIEF OF PLAINTIFF IN ERROR.

T. J. NORTON,
E. W. CAMP,
Attorneys for Plaintiff in Error.

ROBERT DUNLAP,
Of Counsel.

STATEMENT OF THE CASE.

Judges and lawyers often remark that "personal injury" cases are increasing out of all proportion to other litigation. Reasons for this are the abolition by statute in some states of the fellow-servant rule, the refining away of that rule by the courts of other states, and finally the ingenuity of client and counsel in shaping and bending facts and circumstances so as to shift to the master's back the burden of a fellow-servant's negligence. Of this last, the present case is a striking example.

Plaintiff sued defendant as a federal corporation for damages sustained in a head end collision between two trains on one of which he was an engineer. He recovered a judgment, which was affirmed by the Circuit Court of Appeals, and this writ of error was thereupon sued out.

Plaintiff's train No. 4 was at Needles, California, eastbound, the other train, No. 3, approaching Kingman, Arizona, westbound, and a little more than two hours behind its schedule time (see map facing p. 58 of Transcript). Orders were given from division headquarters, at Needles, to each that No. 3 should have the right of way and run two hours behind its schedule.

Under these orders the trains moved toward each other. The engineers of No. 4 (which had

two engines) found that they could reach Franconia in time to take the siding before No. 3 would be due under the orders, and ran for that station; but No. 3 passed Franconia at high speed at 5:11, six minutes ahead of its time, and crashed into No. 4 a mile and a quarter west of that station between 5:12 and 5:13.

The action was tried without a jury pursuant to stipulation under section 649 of the Revised Statutes, and the court found that the injury was caused by the negligence of the plaintiff in error, holding that train No. 3 passed Yucca station, the next telegraph station east of Franconia, two minutes in advance of its time as fixed by the orders given; that the plaintiff in error was informed of this fact in time to have intercepted No. 3 at Franconia; that plaintiff in error ought to have so intercepted No. 3 with an order to stop at Franconia; and that its failure to do so was the cause of the collision and of the injury (Tr. pp. 13, 14, fols. 24, 25).

No complaint was or could be made of the condition of the roadbed or track, nor of the construction or condition of the colliding trains, both of which were limited passenger trains of the first class.

As soon as both parties had rested, plaintiff in error moved for a nonsuit on the grounds:

1. That the evidence failed to show or estab-

lish any cause of action in favor of the plaintiff and against defendant; and,

2. That the evidence showed that plaintiff was injured by the negligence of his fellow servants.

The motion was denied. (Tr. p. 57, fol. 111).

Before the findings were made or filed, plaintiff in error requested the court in writing to make a finding or declaration of law as follows:

> "That there was no evidence produced in this cause showing, or tending to show, that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause, or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint." (Tr. p. 57, fol. 112.)

And at the same time and manner requested the court to make a finding or declaration of law as follows:

> "That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant." (Tr. pp. 58, 112.)

Plaintiff in error also excepted to the findings made. (Tr., p. 58, fol. 113.)

The findings claimed to be erroneous are as follows:

III.

That the aforesaid collision * * * was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of a fellow-servant or fellow-servants, the negligence of each said defendant though its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damages.

IV.

That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders as to the movement of one of said engines and train. (Tr. pp. 13, 14 fols. 24,25.)

The evidence was preserved in a bill of exceptions so as to submit the question whether or not there was any evidence whatever to support the finding or justify the court's refusal to nonsuit and to find as requested. This we understand to be a matter of law reviewable upon this writ of error.

St. Louis v. Telegraph Co., 148 U. S. 92;
Lehnen v. Dickson, 148 U. S. 71;

Dooley v. Pease, 180 U. S. 126;
Am. Sales Book Co. v. Bullivant, 117 Fed. 255;
Wright v. Bragg, 96 Fed. 729;
Barnard v. Randall, 110 Fed. 906;
Kunkel v. Brown, 99 Fed. 593.

Plaintiff in error has the burden of showing that the finding of negligence on its part is wholly unsupported by any evidence on which such finding could be made. But to make out actionable negligence a finding of several facts was necessarily implied; and if anyone of those implied findings is wholly without evidence to support it, the finding of plaintiff's negligence is wholly without evidence on which to stand and plaintiff in error's motion for nonsuit should have been allowed and its request for findings or declarations should have been granted.

Plaintiff in error insisted and here insists:

First. That the orders given were sufficient, if obeyed, to insure the safe moving of both trains;

Second. That the plaintiff in error was not guilty of negligence in not giving a further order, because:

a. There is no evidence that Train No. 3 did pass Yucca ahead of its time;

b. There is no evidence that plaintiff in error

was informed that Train No. 3 passed Yucca ahead of its time;

c. Conceding that No. 3 did pass Yucca too soon, and that plaintiff in error knew of that fact, yet there is nothing to show that any duty was thereby imposed on plaintiff in error to issue a further order;

d. If any such duty was imposed, there is nothing to show that plaintiff in error was bound to issue such order as early as 5:11, at which time No. 3 passed Franconia.

Third. The findings do not support the judgment because it does not appear that the negligence of the dispatcher was that of plaintiff in error and not that of a fellow servant.

Fourth. Conceding that plaintiff in error was negligent, there is nothing to show that such negligence was the proximate cause of the injury.
jury.

In all these propositions except the third, we attack the findings on the ground that they are wholly unsupported by evidence.

ASSIGNMENT OF ERRORS.

I.

That said Court erred in rendering the judgment made and entered in said cause for the reason that the findings of fact made by said Court in said cause do not sustain said judgment and are insufficient to justify said judgment.

II.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law.

III.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particulars, to wit:

1. The facts found are insufficient to show that the negligence or want of care mentioned in said findings on the part of plaintiff in error's train dispatcher amounted to a violation of any duty owing from the plaintiff in error to the defendant in error under or by virtue of the relation

of employer and employe or the contract of employment existing between defendant in error and plaintiff in error and mentioned in said complaint.

2. That the facts found are insufficient to show that the negligence or want of care on the part of plaintiff in error's train dispatcher mentioned in said findings was in violation of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid, the performance of which duty had been delegated by plaintiff in error to said train dispatcher.

3. The findings do not show but what said negligence and want of care on the part of plaintiff in error's train dispatcher was the negligence of a fellow-servant or co-employe of defendant in error.

4. The findings are insufficient to show that plaintiff in error's said train dispatcher was guilty of any want of care or negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by reason of the relation or contract aforesaid.

5. The findings are insufficient to show that plaintiff in errors said train dispatcher was guilty of any want or care of negligence in respect to the performance or discharge of any duty owing from plaintiff in error to defendant in error by

reason of the relation or contract aforesaid, the performance and discharge of which had been delegated by plaintiff in error to said train dispatcher.

IV.

That said Court erred in rendering the judgment made and entered in said cause and in finding the conclusions of law made and found in said cause, for the reason that the findings of fact made in said cause are insufficient to justify said judgment or either of said conclusions of law in the following particular, to wit:

That the facts found do not show but that the collision and each and all of the injuries complained of were solely caused by negligence, carelessness and want of care on the part of the fellow-servants and co-employes of defendant in error.

V.

That the trial court erred in making and rendering that portion of its findings of fact and conclusions of law wherein it is found that the accident and collision mentioned in said findings was caused or resulted by reason of negligence and want of care on the part of plaintiff in error through its train dispatcher; for the reason and on the ground that there was no substantial evidence produced in said cause supporting or tending to support said findings.

VI.

That the trial court erred in making and finding that portion of No. III of said findings of fact and conclusions of law wherein it is found that the accident and collision referred to in said findings "was caused wholly by the negligence and carelessness of the defendant through its train dispatcher, together with the negligence and carelessness of the fellow-servant or fellow-servants, the negligence of which said defendant through its train dispatcher and fellow-servant or fellow-servants proximately contributing to the aforesaid collision, injuries and damage," for the reason and on the ground that there was no substantial evidence produced in said cause showing or tending to show that plaintiff in error through its train dispatcher was guilty of or chargeable with any negligence or carelessness which directly or proximately caused or contributed to cause said collision, injuries and damages or any part thereof.

VII.

That the trial court erred in making and finding No. IV of its findings of fact, for the reason and on the ground that there was no substantial evidence produced in said cause supporting or tending to support said finding or any part thereof.

VIII.

That the trial court erred in refusing to find or adopt the finding or declaration of law proposed and requested by counsel for plaintiff in error as follows:

"That there was no evidence produced in this cause showing or tending to show that said defendant was guilty of or chargeable with any negligence, carelessness or want of care which directly or proximately caused or contributed to cause the collision mentioned in the complaint in this cause or any or either of the alleged injuries sustained by plaintiff at the time of said collision as mentioned and described in said complaint."

IX.

That the trial court erred in refusing to find or adopt the findings or declarations of law proposed and requested by counsel for plaintiff in error in words as follows:

"That there was no substantial evidence produced in said cause tending to show or establish any cause of action in favor of said plaintiff and against said defendant."

X.

That the trial court erred in overruling and denying the motion for non-suit made by counsel for plaintiff in error at the close of all the evidence in said cause and before the argument and

final submission of said cause; said motion being made upon the following grounds:

"1. That the evidence failed to show or establish any cause of action in favor of the plaintiff and against defendant; and,

2. That the evidence showed plaintiff was injured by the negligence of his fellow-servants."

ARGUMENT.

I.

The Orders were Sufficient.

There is nothing in the findings or opinion of the Circuit Court to indicate that it considered the orders insufficient; nothing to indicate that that court based its judgment in whole or in part on that ground.

That court in announcing its decision said:

> "Train Number 3, which should have passed Yucca at 4:57 did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and in failing to so act was negligent. * * * *Said negligence* of the train dispatcher, together with that of the conductor and engineer of train No. 3, in running said train ahead of its time, caused said collision." (Tr. pp. 18, 19, fols. 34, 35.)

Subsequently special findings of fact and con-

clusions of law were made and filed, wherein the negligence of plaintiff in error's train dispatcher is specified as follows:

> "That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders *as to the movement of one of said engines and train.*" (Tr. p. 14, fol. 25.)

Yet by the writer of the opinion handed down by the Circuit Court of Appeals insufficiency of the original orders was suggested as a possible ground for affirmance. "Under the circumstances," Judge Gilbert says, "it would seem that ordinary prudence required of the train dispatcher that he fix a point of meeting of the trains" (Tr. p. 114, fol. 226).

Not a particle of evidence supports that position. Plaintiff himself, an engineer of long experience, said that the orders were good and sufficient (Tr. p. 25, fol. 46, p. 26, fol. 49). So also testified Mr. Williams, the engineer of No. 3, whose disregard of the orders caused the wreck (Tr. p. 40, fol. 76). The dispatcher himself says that the system of dispatching under and in accordance with which the orders were issued is in use on all the best roads; (Tr. p. 31, fols. 60, 61). Mr. Butler, Chief Dispatcher, said that there was no need of an order fixing a meeting

point (Tr. p. 47, fol. 90). Mr. Denair, Division Superintendent, testified that the orders were proper and safe, (Tr. p. 48, fol. 93, 96 to 100); that such orders are in use on 90 per cent. of the mileage in the United States, (Tr. p. 49, fol. 94) —on all roads that use "the Standard Code," (Tr. p. 52, fol. 102). No other witness testified on the point. Upon these facts the suggestion made by Judge Gilbert cannot be called an inference from evidence; it is a mere obiter remark with no basis whatever in the case, but expressing the writer's personal idea of the proper mode of handling trains; an idea opposed to the experience of more than fifty years as shown by the standard rules which are the fruit of that experience—much of it expensive. Of the sufficiency of these rules there is besides a strong presumption of law.

> Thompson on Negligence, Vol. IV, section 4152.

II.

Plaintiff in Error was not Negligent in not Giving a Further Order.

The Circuit Court found and the Court of Appeals assumed that train No. 3 (westbound) passed Yucca, a station about two-thirds of the way from Kingman to Franconia, at 4:55, or two minutes ahead of its time under the orders, and therefore in violation of them, and that the railway

company knew this; and both courts held the Company negligent in not sending further orders to hold that train at Franconia. It may be noted here that No. 4 could not be notified because it had passed the last telegraph station west of Franconia before No. 3 reached Yucca.

Now appellant insists, first, that there is no evidence that train No. 3 passed Yucca ahead of its time; second, nor, if it did, that appellant was aware of the fact; third, conceding that No. 3 did pass Yucca two minutes too soon, that fact and knowledge thereof imposed no duty on the Railway Company to issue further orders; fourth, conceding such duty, the dispatcher was not bound to anticipate that train No. 3 would make a further gain of four minutes after passing Yucca, and to issue an order to stop in time to intercept that train at 5:11, the time that it passed Franconia;

First. Where is the evidence tending to show that No. 3 did pass Yucca two minutes or any less time in advance of its schedule?

The operator at that station says: "I reported that the train passed at 4:55" (Tr. p. 35, fol. 69), and adds that a few minutes later he was told by the train dispatcher to whom he made the report that his clock was two-minutes slow (Tr. p. 35, fol. 69). This correction of time was made almost immediately and at least eleven minutes

before No. 3 reached the next station. For the operator at Kingman heard the telegraphic conversation about the difference in time and it is plain from his testimony that it occurred before the accident. He says he heard this conversation about 5 o'clock and fixes the time because the accident occurred after 5 (Tr. p. 54, fols. 105, 106.) The dispatcher's testimony refers to the time he changed the entry on his time sheet and not to the time when he ascertained the difference in the clocks (Tr. pp. 30, 31, fols. 59, 60). Correct time is given daily at 8 a. m. to all stations (Tr. p. 42, fol. 79), and the operator at each station is expected "to take the correct time from the wire each morning at 8 o'clock" (Tr. p. 45, fol. 87). So that it was about 21 hours since the clock at Yucca had been corrected. It was not a standard clock (p. 45, fol. 87), so that there is nothing remarkable in its being 2 minutes too fast or too slow.

Another item of evidence shows that this conversation occurred before the accident. Train 34, (a freight), pulled out of the east end of Yucca siding at the same time that No. 3 was passing. It was the duty of the operator to report promptly the leaving time of this train. He reported it and it stands on the train sheet without correction "4:57". (Tr. p. 55, fol. 107; Exhibit facing p. 98.)

The operator at Yucca does not say at what time the train did in fact pass his station. He says, "I reported that it passed at 4:55" (Tr. p. 35, fol. 69); and then says he was told that his clock was two minutes slow. He was not asked when it did in fact pass.

The dispatcher says that about 4:58 he was notified that No. 3 passed Yucca at 4:55 (Tr. p. 27, fol. 52). This is no evidence of the fact that the train did pass at that minute. Perhaps if the operator at Yucca had not been accessible as a witness a report made by him in regular course might have been evidence of the fact stated, but not so when he is available and is actually called and testifies.

The train sheet was not evidence that the train passed at 4:55. Whether regarded as a mere memorandum or an entry made in regular course of business it was not competent evidence of the time of the passage of the train. For if it was a memorandum it was made by the dispatcher on hearsay information, given by the operator at Yucca, and therefore, could not be introduced in evidence *to show the time of the passage of the train*, except (if at all), in connection with the testimony of the operator, who was accessible and actually testified, but, as just stated, was not asked the vital question.

Numerous corrections appeared on the train

sheet; the mode of making the entries, the reasons for changes, the mode of making them were all explained by the chief dispatcher, (Tr. pp. 42-44, fols. 81-84). Even if such memoranda are styled entries in due course of business they were not admissible because the man who made them was living, accessible and a witness.

Chicago Lumbering Co. v. Hewitt, 64 Fed. 314.

If the train sheet was competent or relevant at all it was to show what report concerning the train had been received. On its face it showed 4:55, with the last figure changed to 7 (Tr. Exhibit facing p. 98).

Now the Judge of the Circuit Court said he believed that the dispatcher in telling the agent at Yucca, that his clock was slow was merely making a clumsy attempt after the accident to shield himself (Tr. p. 19, fol. 35). Suppose that surmise (and it is nothing more) to be correct; *still we are without a scintilla of evidence to show when train No. 3 passed Yucca.*

The witness Ross says that he does not know when No. 3 passed Yucca; that on his next trip (after the accident) the operator told him that No. 3 had passed at 4:57 and also told him that his train (No. 34) had left Yucca at 4:57 (Tr. p. 55, fol. 108). The train sheet also shows that Yucca reported No. 34 leaving at 4:57 (Exhibit

facing p. 98). Now, if this is any evidence at all it shows that No. 3 left Yucca at 4:57; for it is not disputed that 34 pulled out of the east end of Yucca siding as 3 passed by (Tr. p. 55, fols. 107-8.)

Hall indeed says that Ross told him that his (Ross's) understanding was that No. 34 left Yucca at 4:55 (Tr. p. 56, fol. 110). That may perhaps weaken Ross's statement that he *did not know* the time No. 3 passed Yucca, but it is no evidence of the time when No. 3 did pass Yucca.

Williams, engineer on No. 3, says he passed Yucca at 4:57 or 8; and that he looked at his watch at the time (Tr. p. 41, fol. 77). A little computation will show that it is hardly possible No. 3 passed Yucca at 4:55. It had stopped at Kingman and received orders (Tr. pp. 37, 53-4, fols. 72, 104) and left there at 4:31 (Tr. p. 54, fol. 106). It had to get under way and run 23.9 miles to reach Yucca (Tr. map facing p. 58). If it passed there at 4:55 it had started from a standstill and made the whole distance at 59.75 miles an hour. If it passed Yucca at 4:55 and Franconia at 5:11 the rate between those points was only 48 miles an hour (see map)—yet it passed Franconia at between fifty and sixty miles an hour, passing there at 5:11 and striking No. 4 a mile and a quarter west at a few seconds after 5:12 (Tr. p. 26, fol. 49; p. 32, fol. 61). But if we

assume that the time at Yucca was 4:57, then the rates are practically the same, being at 55.15 miles an hour from Kingman to Yucca and 55.85 from Yucca to Franconia.

Second. If train No. 3 did pass Yucca at 4:55, *defendant was not aware of the fact.*

Much of what has already been stated applies also to this proposition. Train No. 3 having passed Yucca the operator there reported it as passing at 4:55. At once and before the train reached the next station the operator was asked to state the time by his clock and then was informed that his clock was two minutes slow, which meant that his report should have read 4:57.

The dispatcher then understood that No. 3 was at Yucca exactly on the schedule fixed by the orders. He therefore had no reason to doubt the safety of No. 4 until No. 3 was reported passing Franconia at 5:11, six minutes too soon.

Third: Even if No. 3 was two minutes ahead of time at Yucca and the dispatcher knew it (assuming those facts for the sake of argument), plaintiff in error was under no legal obligation to issue a further order.

The question presented here is whether after a train dispatcher who has issued proper and sufficient orders for the operation of a train or trains, the observance of which by the train crews would

have insured the safety of all concerned, hears that such orders have been disregarded, he is required, in the performance of some duty owing from his principal to other employes and personal and absolute in character as distinguished from such duties of a principal as may be properly delegated to co-employes, to re-issue the orders or promulgate new ones to shield his principal from liability to such of its employes as might be injured in consequence of the disobedience of such original orders by their fellow-servants.

The findings of fact specify the negligence on the part of Train Dispatcher Moore as follows:

> "That defendant's train dispatcher when on duty as such, and when having charge of the movement of said engines and trains, was negligent in failing to use ordinary and reasonable care and precaution to prevent said engines and train from colliding; and in failing to use ordinary care and prudence by not giving proper orders as to the movement of one of said engines and train." (Tr. p. 14, fol. 25.)

The findings of fact clearly confine the negligence attributed to plaintiff in error to a failure on the part of Train Dispatcher Moore, after notice that No. 2 had passed Yucca two minutes ahead of time, to attempt to prevent the continued violation of the order. That this was the theory upon which the learned trial judge held against plaintiff in error is shown beyond

question by his written opinion filed at the time of announcing his decision. Therein his conclusion is stated as follows:

> "Train No. 3, which should have passed Yucca at 4:57 did so at 4:55 and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia, and in failing to so act was negligent." (Tr. pp. 16, 18, fols. 30, 34.)

And further:

> "Said negligence of the train dispatcher, together with that of the conductor and engineer on Train No. 3 in running said train ahead of its time caused said collision, and therefore defendant is responsible for plaintiff's injuries." (Tr. p. 19, fol. 35.)

The order of the court was that the finding should be prepared in accordance with its written conclusions (Tr. p. 19, fol. 36.)

Good and sufficient orders had been delivered not only to the engineer of No. 3 (Tr. p. 37, fols. 72, 73) but also to the conductor (Tr. p. 54, fol. 104.) They were in joint charge of the train (Tr. p. 66, rule 48) and the engineer was bound to obey any reasonable order given by the conductor (Tr. p. 66, rule 49). If the train passed Yucca at 4:55 it was the conductor's duty to order its speed reduced till it should be again within its schedule (Tr. p. 60, rule 7.)

The respondent therefore asks the court to hold that the train dispatcher was bound to assume

not merely that the engineer would continue in disobedience but also that the conductor would negligently permit his train to run on in defiance of the orders in his possession; or that if the dispatcher was bound to suspect the engineer's watch had gone wrong, then that he should also have anticipated that the conductor's timepiece was likewise at fault.

Moreover what does the evidence show as to the situation and circumstances within the knowledge of Train Dispatcher Moore at 4:59 on the morning of this collision, at which time he is said to have been informed by Yucca that Train No. 3 passed at 4:55? So far as appears there was no train on, or about to enter upon, that portion of the line lying between Yucca and Needles except the trains in question. There were at least two trains moving on that portion of the line lying between Yucca and Kingman (Tr. pp. 54-5, fols. 106-7). No. 4 had departed from Needles at 4:22 or 4:23 (Tr. p. 24, fol. 42, Train Sheet facing p. 98); her time table running time from Needles to Franconia was 44 minutes (Tr. Time Table facing p. 94); this was at a rate of speed of less than 32 miles per hour (Tr. p. 26, fol. 50); the distance between Needles and Franconia was only 24.5 miles (Tr. Map facing p. 58). Thus it appears that had No. 4 on this run made her schedule time from Needles to Franconia, and to

have done so would have required only an average speed of 32 miles per hour, she would have arrived at Franconia at 5:06, or 11 minutes before No. 3 was, according to her orders and time schedules, due at that point (Time Table facing p. 94), and 9 minutes before No. 3, running two minutes ahead of time, would arrive. It appears that less than two minutes from the instant of the collision would have sufficed to place No. 4 on the side-track and clear the main track (Tr. p. 24, fol. 45).

No. 4 arrived at Mellen between 4:42 and 4:45, there being some variation in the evidence as to the exact time (Tr. p. 23, fol. 44), having made the run in from one to four minutes less than her schedule time; she departed from Mellen at 4:46, bound for Franconia, to there wait and pass No. 3 (Tr. p. 23, fol. 44); her schedule running time between Mellen and Franconia was 19 minutes, and the distance between these points only 12.6 miles (Time Table facing p. 94). Here again it appears that had No. 4 on this run made her schedule time she would have arrived at Franconia at 5:06, as before shown.

There is not a fact or circumstance shown in evidence in any manner indicating that Train Dispatcher Moore had any reason to believe that No. 4 would not make her schedule time to Franconia and be on the side-track and in safety sev-

eral minutes before No. 3 was due at that station. No. 4 in the run between Mellen and Powell consumed four minutes more than her schedule time for that run, arriving at 5 o'clock instead of 4:56 (Tr. p. 24, fol. 45—Time Table facing p. 94). Powell was neither a telegraph station nor a regular stopping place for either of these trains (Tr. pp. 25, 32, fols. 47, 63), but No. 4 was stopped there for three or four minutes in order that the flow of fuel oil on one of her locomotives might be remedied. This time was lost from her schedule time. Train Dispatcher Moore did not and could not know of these delays.

The dispatcher certainly had no reason to suppose No. 4 would be delayed so much as to be endangered by the supposed encroachment of two minutes by No. 3. In fact the court found that such encroachment did not endanger train No. 4, for he finds that No. 4 would have reached Franconia and been on the siding more than two minutes before No. 3 was due there under the orders (Tr. p. 19, fol. 36).

We submit that the too early arrival (if it be so) of No. 3 at Yucca did not make it the duty of Train Dispatcher Moore, as a representative of his principal, to send any additional orders to No. 3. He had previously promulgated orders which had been regularly delivered to and received by the conductor and engineer of that train

sufficient in all respects to insure the safe operation of the two trains in question had such orders been obeyed, and having once given proper and sufficient orders in the premises, the duty of the master had been fulfilled; and the subsequent violation of the orders in question by the conductor and engineer of No. 3 was an act, not of plaintiff in error, but of fellow-servants of the defendant in error and for which plaintiff in error is not liable. These *conditions* and *facts* are expressly recognized and declared in the first sentence of the 4th paragraph of the conclusions of the trial court as follows:

> "Train No. 4 had sufficient time after leaving Powell to clear No. 3 at Franconia if the latter train had been run in accordance with Order No. 23, and therefore, plaintiff was not guilty of contributory negligence." (Tr. p. 19, fol. 35.)

The above quoted excerpt from the written conclusions of the court, and which is fully sustained by unconflicting evidence, shows conclusively that plaintiff in error through and by its train dispatcher had discharged every duty incumbent upon it in the premises, for "Order No. 23" therein referred to is the order that the train dispatcher had issued to the conductor and engineer of Train No. 3 for their guidance in the operation of said train. The violation of that order by the conductor and the engineer of Train No. 3

was, as is shown by all the evidence in the case, the sole cause of the lamentable catastrophe that resulted in the injuries to defendant in error.

By the promulgation of the orders providing a plan for the operation on this run of the trains in question, Train Dispatcher Moore had fully performed and discharged the duty of plaintiff in error in the premises, and he was not obliged to repeat those orders or promulgate a new one, even if advised that Train No. 3 had to some extent violated its original order by passing Yucca Station two minutes ahead of time. There is no ground either upon reason or authority for holding that a principal is bound to stand over his servants to enforce proper and sufficient orders once given to them; and yet it comes to that if the theory of the trial court can be sustained, that it was the duty of the train dispatcher to send out an additional order for No. 3 to obey the proper and sufficient orders that had already been given.

If the principle announced by the trial Judge in the first sentence of the second paragraph of his Conclusions, that

> "Train No. 3, which should have passed Yucca at 4:57, did so at 4:55, and Train Dispatcher Moore was notified of that fact in time to have stopped said train at Franconia and in failing to so act was negligent" (Tran. p. 18, fol. 34),

—implying as it does that an absolute duty rest-

ed upon plaintiff in error as principal to exercise reasonable care to discover and prevent continuance of transitory dangers which might threaten the safety of certain of its employes, although such dangers are created by negligent violations on the part of their fellow-servants of proper and sufficient orders issued by plaintiff in error for the government of the common work—is correct, then it is difficult to understand how an employer can ever relieve himself of liability if his orders are disobeyed and his intentions thwarted by careless employes.

We concede that it is the duty of a railroad company to promulgate adequate rules and regulations for the safety of its employes engaged in the dangerous duty of operating trains, and at times telegraphic orders for the movement of trains, but the duty of the railroad company goes no farther.

The duty of complying with the rules, regulations and orders that have been given to them and of carefully operating the trains is a duty incumbent upon those employes to whom their operation has been intrusted. All employes so engaged are fellow-servants and no recovery can be had against the railway company for an injury sustained by one of such employes due to the negligence of another, notwithstanding such negligence may have consisted *solely* in the disobed-

ience of an order issued by the company for the operation of its trains.

This principle of law is sustained by every adjudicated case with which we are familiar, and is very clearly and forcibly stated in Bailey's "Personal Injuries Relating to Master and Servant," Vol. II, Sec. 3290, as follows:

> "It is the duty of railroad corporations to prescribe, either by means of time-tables or other suitable modes, regulations for running their trains with a view to better safety, but it is obvious that obedience to these regulations must be intrusted to the employes having charge of the trains. Such obedience is matter of executive detail which, in the nature of things, no corporation can personally oversee and as to which employes must be relied upon."

Obedience to the regulations of a railroad company in regard to the running of trains is a matter of executive detail which neither the corporation nor any general agent of it can personally oversee but as to which employes must be relied upon. If these employes fail in their duty by breaking existing regulations and in consequence other employes are injured, no action can be maintained for the injury, as it will be deemed to have been caused by the negligence of a fellow-servant.

Rose vs. Boston & A. R. Co., 58 N. Y. 217;

Slater vs. Jewett, 85 N. Y. 62; 39 Am. Rep. 627;

Kennelty vs. Baltimore etc. R. Co., 166 Pa. St. 60; 30 Atl. 1014;

Healy vs. New York N. H. & H. R. Co., 20 R. I. 130; 37 Atl. 670.

In Healy vs. New York N. H. & H. R. Co., *supra*, the rule is very clearly and forcibly stated, in the third point of the syllabus, as follows:

> "Where a railroad company transmits to an engineer orders which, if obeyed, will avoid a collision with another train, it has in that respect performed its duty of furnishing a clear track for such train, and is not liable to a fellow-servant of such engineer for injuries by a collision produced by the engineer's disobedience of the orders.

Not only did the crew in charge of No. 3 violate the special orders given them but they also were guilty of a flagrant violation of General Rule 392, which provides as follows:

> "A train must not leave a station in advance of its schedule time." (Tran. p. 82, fol. 162.)

How many times was the railroad company under obligations to issue good and sufficient orders for the movement of the trains in question, and by what rule of law could the violation of such orders by its employes give a right of action against the railroad company to their fellow-servants who were injured by rea-

son of such negligence on the part of such careless or wilful employes?

And it seems to us that the following excerpt from the opinion of the court in Maher vs. Union Pacific D. & G. Ry Co., 206 Fed. 311, is exceedingly applicable to the facts of this case and decisive of the non-liability of the plaintiff in error:

> "The train dispatcher did not give any orders to the conductor of No. 12, regulating the movement of his train at Clayton station. How he should move his train there, and whether he should head out or back out of the siding, and what precautions he should take to prevent a collision while moving his train onto the main track, were matters of detail, concerning which it was the duty of the conductor to conform to the usage and practice in such cases and the rules of the company. Such matters of detail are not regulated, and cannot be regulated, by orders from the train dispatcher. All orders emanating from the train dispatcher are to be received and read in the light of these well-known rules for the movement of trains at stations on and off the sidings, and for the violation of such rules the train dispatcher is not to be convicted of negligence."

A master is not bound to supervise the merely executive details of the work to be done by his servants.

In Howard vs. Denver & R. G. R. Co., 20 Fed. 837, it was said:

> "The negligent use by one employe of perfectly safe machinery will seldom be adjudg

> ed a breach of the master's duty of providing a safe place for other employes. Such a construction would make any negligent misplacement of a switch, any negligent collision of trains, even any negligent dropping of tools about a factory, a breach of the duty of providing a safe place."

The same doctrine is announced in Baird vs. Reilly, 35 C. C. A. 78; 92 Fed. 884, where the plaintiff based his claim upon an alleged violation of the duty of the master to supply a reasonably safe place for work, and after conceding the correctness of that proposition, in cases where applicable, the court said:

> "When, however, it appears that the working place originally, and when the employe was sent to do the work there, was reasonably safe, but became unsafe at the particular time of the accident by causes that could not have been anticipated, by exigencies created in carrying out the details of the work, or by the neglect of a fellow-servant, a different rule is applicable."

In Michigan C. R. Co., vs. Dolan, 32 Mich. 510, the same limitation upon a master's positive obligations to his servant, is recognized and expressed as follows:

> "We are not disposed to discuss the question, on which some courts have differed, how far down in the chain of delegated appointments the master is to be held as bound to personal supervision. The starting point—that he is only liable for his own neglect—is one from which we have no right

to depart. And it is plain enough that, when he is held to any personal supervision which, from the nature of his business, is impracticable, the rule is violated, and there is no tangible distinction left between liability to servants and liability to strangers. We think some of the decisions have led very far towards destroying all means of discernment."

Judge Morrow in Herman vs. Port Blakely Mill Co., 71 Fed. 853, recognized and applied this limitation, saying:

"The contention of counsel for libelant is that the place where libelant was working was rendered unsafe by reason of the fact that the person on the wharf whose duty it was to give the warning failed to do so and that this negligence constituted a breach of duty on the part of the master to furnish a safe place for libelant to work in. The word 'place,' in my judgment, means the premises where the work is being done, and does not comprehend the negligent acts of fellow servants by reason of which the place is rendered unsafe or dangerous. The fact that the negligent act of a fellow servant renders a place of work unsafe is no sure and safe test of the master's duty and liability in this respect, for it may well be said that any negligence which results in damage to some one makes a particular spot or place dangerous or unsafe. To so hold would virtually be making the master responsible for any negligence of a fellow servant which renders a place of work unsafe or dangerous. It would be doing the very thing which it is the policy and object of the general rule not to do."

The rule above enunciated cannot be questioned, for it is supported by an unbroken line of decisions not only of the Supreme and Circuit Courts of the United States, but also by the courts of last resort of every state of the union. And the fact set forth in the opinion of the trial court, that—

> "Train No. 4 had sufficient time after leaving Powell to clear Train No. 3 at Franconia *if the latter train had been run in accordance with Order No. 23*". (Tr. p. 19, fol. 35).

brings this case squarely and unequivocally within the rule above stated; and it follows that there were neither facts nor *legitimate inference of fact* anywhere in the case to support findings of fact three and four above referred to.

The plaintiff in error, having discharged its full duty toward its employes engaged in operating the trains in question, could not be deprived of the immunity thereby secured by the action of the conductor and engineer of No. 3; for if such a theory could be sustained it would nullify the general doctrine of the non-liability of the master for injuries caused by the conduct of fellow servants. Special Order No. 23 did not in terms prescribe the general running time of No. 3, that is to say, it did not designate the time of the arrival and departure of that train from the several stations intervening between Kingman and Needles, but

only required it to run two hours late, and left its movements otherwise to be governed by the schedule time upon that portion of the road in question; nor did it in anywise alter the effect or general rules for the operation of trains. And, as already stated, "Rule 392" provided, among other things, that:

> "A train must not leave a station in advance of its schedule leaving time."

And it appears from all the evidence in the case that but for such special order the time of No. 3 would have been 2:57 at Yucca Station and 3:17 at Franconia, and under the special order 4:57 at Yucca and 5:17 at Franconia, and under the above quoted provision of Rule 392 No. 3 should not have left either of these stations a moment in advance of 4:57 at the one and 5:17 at the other; and of the existence of that rule and of the necessities therefor and the duties and obligations it devolved upon them the engineer and conductor of No. 3 had full and complete notice, and yet they violated it two minutes at Yucca Station and six minutes at Franconia. Under these facts it would have been an idle thing for the train dispatcher to send any additional orders to No. 3 after having learned of its violation of running time at Yucca, and something not required either by principle or authority.

That such violation of orders created a dan-

gerous condition goes without saying, but by whom? Certainly not by the plaintiff in error nor by its train dispatcher, but solely and exclusively by the fellow servants of the defendant in error. In this connection we quote from the opinion of the Supreme Court of Mississippi delivered by Chief Justice Campbell, in a case practically "on all fours" both as to facts and law with the case at bar, an extract which most forcibly and peculiarly expresses the situation here:

> "It is not admissible now to try the sufficiency of the order given by the train dispatcher by the lamentable result of its disobedience by those in charge of train No. 6. *Post hoc ergo propter hoc* is no legitimate argument. There is not room for difference of opinion as to the sufficiency of the order given to No. 6 to have prevented the collision, if it had been regarded. That form of order was in frequent use on the road and was well understood, and but for its having been disobeyed would have insured the safety of Doyle.
>
> Chicago, St. L. & N. O. R. R. Co., vs. Doyle, 60 Miss., 977; 8th Am. & Eng. R. R. Cases 174.

In Lewis vs Seifert, 116 Pa. St. 628; 11 Atl. 514, the leading case with regard to a train dispatcher as a vice-principal, in dealing with the question of the liability of a railway company for the acts of its train dispatcher, it is said:

> "If it be the duty to provide schedules for

> moving of its trains which shall be reasonably safe it follows logically that, when the schedules are departed from, when trains are sent out without a schedule, such orders should be issued by the company as will afford reasonable protection to the employes engaged in the running of such trains. I am not speaking now of collisions *caused by disobedience of orders on the part of conductors and engineers, but of collisions or other accidents the result of obeying such orders.*"

And again:

> "The distinction between a general dispatcher—one who has the absolute control of all the trains upon the road—and the conductor or engineer of a train is manifest. *The latter have the duty of obedience.* Their business is to run their trains under orders from the dispatcher, and if an employe is injured *as the result of their negligence, the company is not liable.* They are in the same common employment, and are laboring together to the same end, and under orders from superior authority."

The dangerous situation caused by the engineer and conductor of No. 3, by their violation of special order 23 and rule 302, was without fault on the part of the plaintiff in error and consequently it was under no *legal* obligation either to them or to any of their fellow servants to take measures to rescue them from the impending danger, although, of course, a different rule would obtain between the plaintiff in error and third parties, passengers on its train for instance. This

principle is clearly enunciated by the Supreme Court of Georgia in *Allen v. Hickson*, 119 Ga., 400; 30 S. E., 810, in which Judge Lumpkin, in delivering the opinion of the court, declared it as follows:

> "When an employe without fault on the master's part, becomes placed in a dangerous or painful situation, *the master is under no positive legal duty of exercising all reasonable care and diligence to effect such employe's speedy release.* Being in no way responsible for the unfortunate occurrences, the master cannot be said to be guilty of a tort if he does not promptly take active steps in coming to the rescue. The only duty arising under such circumstances is one of humanity, and for a breach thereof the law does not, so far as we are informed, impose any liability."

The rule is well established that the duty to provide a safe place for the work does not carry with it the obligation to protect that place from dangers arising from acts of fellow servants, even in cases where the fellow servant fills a dual capacity, that is, being a vice-president insofar as providing a safe place is concerned.

Donnelly v. S. F. Bridge Co., 117 Cal., 417;

Donovan v. Ferris, 128 Cal., 48;

Martin v. Atchison, T. & S. F. R. Co., 166 U. S., 399; 41 L. Ed., 1051;

O'Neil v. Great Northern R. Co., 80 Minn., 27; 82 N. W., 1086.

The master is under no obligations to preclude or warn against such dangers as arise from the conduct of the business in which his employes are engaged and which are transitory risks incident to the work and produced by the action of the employes themselves.

Northern Pacific R. Co. v. Dixon, 194 U. S. 338.

In Whittaker v. Bent, 167 Mass., 588; 46 N. E. 121, this doctrine was expressed as follows:

"The absolute obligation of an employer to see that due care is used to provide safe appliances for his workmen is not extended to all the passing risks which arise from short-lived causes."

See also as supporting the same doctrine:

Meehan v. Spiers Mfg. Co., 172 Mass. 375; 52 N. E., 518;

Durst v. Carnegie Steel Co., 173 Pa., 162; 33 Atl., 1102.

"Where a railroad company transmits to an engineer orders which if obeyed will avoid a collision with another train, it has in that respect performed its duty of furnishing a clear track for such train and is not liable to a fellow-servant of such engineer for injuries by a collision produced by the engineer's disobedience of the orders.

"No amount of diligence on the part of a railroad company can prevent an accident like the one upon which the second count is based. The company has the right to presume that its orders will be strictly fol-

lowed; and all it can do when such orders are disobeyed is to summarily discharge the servant who thus offends, as was done in the case at bar. So far as appears the defendant had no more reason to believe that Pickering would disobey the orders of his superior than the plaintiff had."

Healy v. R. R. Co., 20 R. I. 136, 37 Atl. 676.

Fourth: Conceding, for the sake of argument, that the dispatcher was bound to issue an order to stop, he was under no obligation to issue it in time to intercept No. 3 at Franconia at 5:11.

The Circuit Court found that the train dispatcher was negligent in failing to stop No. 3 at Franconia. While the finding is so stated, it necessarily implies a more specific finding of facts as follows: The train dispatcher was negligent in failing to give the operator at Franconia a stop order for No. 3 in time to intercept that train at 5:11.

Now, is it true under the evidence that the train dispatcher was negligent in not having an order to stop at Franconia before 5:11, at which time No. 3 passed that station? The rules (see tr. p. 93, fol. 183) provide a specific form for a stop order. It is very brief, it can be transmitted certainly in fifteen seconds, probably in less time than that. There was an operator on duty at

Franconia subject to call at any instant. It is not expected that orders shall be given long in advance or much in advance. It is provided that they shall not be given an unnecessarily long time in advance (tr. p. 88, rule 471). Now, assuming that the train dispatcher understood that No. 3 had passed Yucca station at 4:55, he knew that the running time between Yucca and Franconia was 20 minutes. He knew, therefore, that if No. 3 did not exceed its running time between those stations, it would not get there before 5:15; so an order to intercept No. 3 at Franconia would be in time if given as late as 5:14. Then if he was bound to stop No. 3 at Franconia, he could not be negligent until it was too late to give an order that would be effective at 5:15. Now, it may be that up to 5:11 he had not intended to give an order to stop No. 3. But there can be no negligence in law until the *time for action* has passed without action. The time for action did not elapse until 5:14. The train dispatcher, therefore, cannot be said to have been negligent at 5:11 for failing to give an order which he was not bound to give before 5:14. To say otherwise is to say again that the train dispatcher was bound to expect that the engineer of No. 3 would gain additional time, the only ground for such expectation being that he had gained two minutes on his time in passing Yucca. We have found no

authority for the position that an employer is bound to expect negligence in an employe from the fact that that employe has been guilty of a single act of negligence theretofore, nor any authority holding that an employer is bound to expect a greater degree of negligence from a less degree.

It was of importance that No. 3, already late, be brought west as rapidly as practicable. For that reason it had been given the right of track. The train dispatcher had a right to wait until 5:13 or 5:14 for the report of the arrival of No. 4 at Franconia from the west. Such arrival reported, it would have been unnecessary to stop No. 3. If at 5:13 No. 4 had not arrived it would have been time to order No. 3 held for orders, that is, ordered not to leave Franconia before 5:17.

III.

If the train dispatcher was negligent, his negligence was not that of the company but of a co-servant.

It is to be noted here that it is nowhere suggested that any notice of any fact pertinent to this case was brought to any person, except the train dispatcher, who can by any possibility be deemed a vice-principal.

Negligence of plaintiff in error "through its train dispatcher" was the finding of the court

(tr. p. 14, fol. 25). If this be regarded merely as a finding that plaintiff in error was negligent, then we contend that it is wholly unsupported by evidence, since the evidence shows negligence (if any) only on the part of the engineer and conductor of train No. 3 and on the part of the train dispatcher, all of whom were made under the circumstances shown here fellow servants of defendant in error.

If this be regarded as a finding that the train dispatcher was negligent and that, therefore, the plaintiff in error is liable, we contend that the finding does not support the judgment in that it fails to show that the negligence of the train dispatcher was that of a vice-principal and not of a fellow-servant. Special findings must, like special verdicts, state all facts necessary to support the judgment and leave nothing for inference.

Even should it be held that there is a duty resting upon a train dispatcher to discover and warn against the continuance of isolated and temporary violations of orders by train crews in the operation of their trains under original orders proper and sufficient for that purpose, still we confidently contend that such duty is not a positive duty of the railroad company or master but one of the performance of which may be properly delegated to an employe. The test of vice-principalship is the nature of the duty which it is claimed has been

violated or the character of the act the performance or non-performance of which caused the injury complained of. The mere fact that the performance of a duty not personal to a railroad company as master is delegated to a train dispatcher does not change the essential nature of the duty and make it one for the violation of which by the train dispatcher the railroad company may be held liable. The logic of the decision of the trial judge in this case seems to be that if a train dispatcher sustains the relation of vice-principal to his employer and co-employes in respect to any act or duty, it follows that he sustains the same relation in respect to every duty he has to perform within the scope of his employment. In other words, that once a vice-principal always a vice-principal. This reasoning, we claim, is clearly unsound. There is express and respectable authority to the point that a train dispatcher is not in all things and at all times the *alter ego* of his employer. In a case recently decided by the Supreme Court of Pennsylvania it was sought to charge a railroad company with knowledge of the incompetency of one of its local telegraph operators by showing that its train dispatcher had knowledge of such incompetency gained while acting as such train dispatcher, on the theory that the train dispatcher was the representative

of the railroad company for all purposes. Upon this point the court said in part:

> "It is contended by the appellant on the authority of Lewis v. Seifert, 116 Pa. St., 628; 11 Atl. Rep., 514, that Perdue (train dispatcher) was vice-principal and that his knowledge of the incompetency of the station agents and telegraph operators in the service of the company must be considered as its knowledge. This might be so if he was clothed with the power of employing and discharging such servants. But he was not charged by the company with its duty in reference to the selection and retention of its employes. *To the extent that he was the representative of the Company in the performance of a positive duty it owed to its servants it is responsible to them for his negligence, but beyond that it is not.* The contention of the appellant that the knowledge of Perdue respecting the qualifications of Crossman was the knowledge of the Company finds no support in Lewis v. Seifert, *supra. In that case the company was held liable for an injury to an employe caused by the negligence of its representative in the performance of a duty it owed to its servants.*" (Italics ours.)
>
> Reiser v. Pennsylvania Company, 152 Pa. St., 38; 25, Atl. 175.

It is a well established rule that an employe may occupy a dual position, that of co-servant as to all matters within the scope of the employment and the discharge of such duties as are not personal to or absolute upon the master, and as

representative of the master in all matters where he is charged with the absolute and personal duties of the master.

In Baltimore & O. R. Co. v. Baugh, 149 U. S., 368, 387; 37 L. Ed., 772, in the course of a full discussion of the question of vice-principalship, the rule mentioned is well expressed as follows:

> "The question turns rather on the character of the act than on the relations of the employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor."

In Olson v. Oregon Coal & Navigation Co., 96 Fed., 109, it is held that even the master of a ship does not in respect to the performance of all of his duties represent the owner. It was said:

> "While it is true the master of a ship is a servant of higher grade than that of a seaman and represents the owner in respect to the personal duties and obligations which the latter owes to the seamen, still in all matters pertaining to the navigation of the ship the master and seamen are fellow servants engaged in one common employment and each assume the risk of the other's negligence in

the discharge of the duties incident to such common employment."

See also as fully sustaining this doctrine:

Northern Pacific R. Co. v. Herbert, 116 U. S., 642; 29 L. Ed., 755;

Union Pacific R. Co. v. Snyder, 152 U. S., 684; 38 L. Ed., 597;

Nixon v. Selby S. & L. Co., 102 Cal., 458;

Donnelly v. S. F. Bridge Co., 117 Cal. 417;

Crespin v. Babbitt, 81 N. Y., 521; 37 Am. Rep. 521.

In Northern Pacific Ry. Co. v. Mix, 121 Fed., 476, and in each of the other cases where it has been held that a train dispatcher acted as the agent or representative of his employer, the duty negligently performed or omitted by the train dispatcher related to the promulgation of orders necessary and required for the safe operation of the train there in question in the manner and according to the plan provided and directed by the master or his representative. In neither of these cases was there involved the question as to the duty of the master or his representative to issue additional orders solely for the purpose of preventing or correcting breaches negligently committed by employes of otherwise sufficient orders already promulgated. In no case, so far as we are aware, has a railroad company ever been held

responsible to any of its employes for a failure of its train dispatcher to send an order commanding obedience to a proper and sufficient order that he had already issued and which had been received but disregarded by the employes to whom it was given. And we challenge both Federal and State Reports to disclose a single case in which a railroad company or other employer has ever been liable to an employe upon facts and circumstances similar to those disclosed by the record in this case.

IV.

Conceding for the purpose of argument, the dispatcher's negligence and that it was that of a vice-principal, It was not the proximate cause of the injury.

> "It were infinite for the law to consider the causes of causes and their impulsions one of another. Therefore, it contenteth itself with the immediate cause and judgeth of acts by that without looking to any further degree."—Bacon.

"Proximate cause," has never been so defined as to furnish a ready rule and measure of every state of facts; but we submit the following quotations and references in order to emphasize the particular phase of the subject presented by the facts disclosed in the case made by the defendant in error and found by the Circuit Court:

Mr. Justice Strong in Railway Company v. Kellogg, 94 U. S. 469; 24 L. Ed., 256, said:

> "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked as to make a natural whole, or was there some new and independent cause operating between the wrong and the injury?"
>
> "The negligence is the proximate cause of an injury from which the injury might and ought to have been foreseen or reasonably anticipated under the circumstances as its probable result. That negligence which sets in motion a train of events that in their natural sequence might and ought to be expected to produce an injury, if undisturbed by any independent, intervening cause, is the proximate cause of that injury."

Judge Sanborn in Railway Company v. Moseley, 57 Fed. 921, an opinion in which Mr. Justice Brewer concurred.

In Louisiana Mutual Insurance Company v. Tweed, 7 Wall. 44; 19 L. Ed. 65, Mr. Justice Miller said:

> "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

Mahogany v. Ward, 16 R. I. 479, 17 Atl. 860,

was an action for injuries suffered by the plaintiff by reason of defect in a highway. The defect consisted in a post that stood too near the traveled part of the highway, and the facts were that the plaintiff driving along the carriage road met a wagon, the driver of which wholly failed to turn out from the middle of the road, forcing the plaintiff to the side and against the post. *The court said that in all the highway cases cited the cause concurring with the defect in the highway to produce the injury was a natural cause or pure accident for which no person was responsible and not as in the case at bar the independent act of a responsible person.* Such an act, it is said, arrests causation, being regarded as the proximate cause of the injury, the original negligence being considered merely as its remote cause. Referring to Wharton on Negligence, Sec. 134.

In Texas & Pacific Railway Company v. Doherty, 15 S. W. 44 (not officially reported,) the suit was brought against a steam railroad company and a street railroad company. Judgment was recovered against both and both appealed. It appeared that the steam road company had left a car standing on its track close to the track of the street road. For the purposes of the opinion is was assumed that the act of the steam road company in so leaving the car was negligence. It appeared that a street car driven

at a moderate rate of speed could pass the stationary car safely, but the employes of the street railroad negligently ran a car at high speed bringing on a collision with the stationary car and causing the injuries complained of. The court held that the negligence of the steam railroad in leaving its car too close to the other tracks was not the proximate cause, was not even a proximate cause of the injuries but that the intervening, independent negligence of the street road, like that of the engineer and conductor here was the proximate cause.

A freight train broke in two owing to defective coupling. After it broke it ran some five miles and the sections came together owing to the negligence of the engineer and of the rear brakeman. It was held that the plaintiff, who was an employe, could not recover because, although the train would not have parted except for the defective coupling, the subsequent negligence of the engineer or of the rear brakeman or both was the proximate cause of the accident.

Richmond v. Tribble's Administrator, 97 Va. 495, 24 S. E. 278.

In State v. Ruth, 9 S. Dak. 84, 68 N. W. 189, it appeared that the defendant was the Commissioner of School and Public Lands; that it was his statutory duty to make a distribution of school funds in the hands of the State Treasurer, that

he failed to make such distribution, and that after the time when it should have been made the Treasurer defaulted and the funds were lost. The court said that it was not alleged that the defendant's conduct was corrupt or that he was guilty of any wanton wrong; that it was not a natural or probable consequence of his negligence that the fund would be lost by defalcation; that an unusual, extraordinary event, *a new, independent and efficient cause intervened sufficient to stand in itself as the cause of the misfortune;* that it and not the defendant's negligence was the proximate cause. Yet it is plain that had the commissioner not been negligent the loss would not have occurred, because the distribution would have been made before the Treasurer's defalcation.

Judge Cooley, in his work on Torts, page 70 of the first edition, says:

> "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remote."

Wharton, in his work on Negligence, Section 134, says:

> "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must

be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent, responsible human action. I am negligent on a particular subject matter; another person moving independently comes in and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so the person so intervening acts as a non-conductor and insulates my negligence so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I am liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."

And he refers to Baron to the effect that causal connection may be interrupted by the intervention of an independent agency although the act whose operation was thus anticipated was of itself calculated to produce the particular evil, giving this instance. A person who mortally wounded a slave could not be held liable for the latter's death when, before death ensued from such wounding, a third person came in and gave the slave another wound from which he immediately died.

In Sections 136, 137, 138, 139 and 140 Wharton states at length the reasons for this limitation in the law of negligence and for this application of the maxim concerning proximate cause,

reasons which seem to be convincing and conclusive and fully to cover this case.

See also Broom's Legal Maxims, 8th ed. p. 216, and the close distinctions made by Chief Justice Erle in

Ionides v. Ins. Co., 14 C. B., N. S. 259.

In Railway Company v. Periguey, 138 Ind. 414, 34 N. E., 233, an engine was sent out with a defective headlight or, rather, with no headlight; but it was provided with hand lamps that could be used in the place of a headlight. They were not used. The engineer had orders to stop at Argos and wait for No. 167. He stopped; but being informed by someone, without authority apparently, that 167 had already passed, he proceeded and after going a few miles saw No. 167 coming and stopped his engine. The engineer on 167, because the other engine had no headlight, did not see it in time to stop, and the question was whether the want of the headlight was the proximate cause, or the failure of the engineer to obey his orders or to use hand lamps. The court said it was indeed true that the company was negligent in sending out the engine with a defective headlight, and that if the headlight had been burning the accident would not have occurred, but that the negligence of the company in that regard would not have brought on the accident but for the independent negli-

gence of the engineer in disregarding his orders to stop and in also disregarding the rules requiring him to use the hand lamps, and that therefore the negligence of the company in sending out the defective engine was not the proximate cause of the injury. The court also said:

> "We have found that the act of the appellant was not a proximate cause of the injury; that the act of Perris (engineer) was the immediate cause of the injury, and it follows that the two acts were not concurrent in causing the injury. We doubt if a case can be found where an act of the master though negligent but not causing injury, or concurring as a cause of injury, is coupled with a wrongful act of a servant and made the basis of recovery fo rsuch injury."

It has been sometimes loosely said that that act of negligence is a proximate cause without which the injury would not have occurred. But a hundred illustrations show the inaccuracy of such a statement. Thus it was negligence for the carrier to use a lame horse, but for which the canal boat would not have been caught in the flood; yet that negligence is not the proximate cause of the ensuing loss of the cargo.

Morrision v. Davis, 20 Pa., St. 171;
Denny v. R. R. Co., 13 Gray, 481.

The negligent act (violating an ordinance) of allowing water to run down a gutter where it

froze, is not the proximate cause of injury to a horse that slipped on the ice and broke his leg.

Sharp v. Powell, L. R. 7, C. P. 253.

A street car was so negligently driven as to throw plaintiff into the street, where, in a moment, she was struck and hurt by a runaway horse; the negligence of the car company was not the cause of the injury, although without such negligence it is manifest the injury would not have been suffered.

Ry. Co. v. Trich, 117 Pa. St. 390; 11 Atl. 627.

A motorman negligently ran his car at rate exceeding that allowed by law, so bringing himself under a tree at the moment that it chanced to fall; it was held that his negligence was not contributory to the injury inflicted on him by the falling tree.

Berry v. Sugar Notch, 191 Pa. St. 345; 43 Atl. 240.

And see the following cases already referred to at some length in this brief:

Mahogany v. Ward, 16 R. I. 479; 17 Atl., 800;

Railway Co. v. Doherty,——Tex. Civ. App.,——15 S. W. 44;

Richmond vs. Tribble's Adm. 97 Va. 495; 24 S. E. 278;

Ry. Co. v. Periguey, 138 Ind. 414; 34, N. E. 233.

This test of indispensableness is a negative and not a positive test: it is valuable for eliminating causes not proximate; for evidently that cannot be a proximate cause without which the injury would nevertheless have occurred. But after eliminating all antecedents not indispensable we may still have a residuum of several negligent acts and in selecting from these the proximate cause, the test referred to will be of no assistance.

It may be impossible to state a formula that shall be aways adequate. But we submit that *a negligent act cannot be deemed a proximate cause of an injury from which it is separated by another's independent negligent act sufficient of itself to produce the disaster.*

Bosworth v. Brand, 1 Dana 377, contains valuable illustrations on proximate cause. A dog is lured by the bait in a trap unlawfully set. While smelling near he is accidentally shot. The setter of the trap is not liable, although but for the trap and its bait the dog would not have been shot; and although, further, the trap would itself have probably injured or killed the animal had he not been shot.

A dealer sells gunpowder to a small boy—a negligent act. The boy put the powder in a cupboard. A week after, his mother gave him some of this powder and he hurt himself with it. It was held, of course, that the negligent act of the mother

intervened as proximate cause relieving the dealer from liability; although, clearly, without his negligent act, the injury would not have occurred and although, clearly his act was such as might probably, very probably, have resulted in the very injury sustained.

Carter v. Towne, 103 Mass. 507. (Opinion by Justice Gray.)

A Railway Company is liable for fires set by it, no matter how far they are spread by the forces of nature; but it was held the company was not liable for death of person suffered while she was trying to extinguish such fire. Her act was voluntary; it was a new intervening cause, not to have been expected.

Seale v. Ry. Co., 65 Tex. 271.

Labatt, Master and Servant, Vol. 2, p. 2229, says that in a few decisions courts have recognized more or less explicitly the principle that a master is not protected by the fact that the injury was immediately due to the negligence of a fellow servant, if the commission of that negligence might reasonably have been anticipated. He says that the general principle which declares that the chain of causation is not broken by a negligent act which might reasonably have been anticipated can not be admitted into the law of an employer's liability without greatly restricting the right of the defendant to rely on the doctrine as to co-

servant; and that it is quite evident that the restriction thus indicated has never received any serious consideration in a multitude of cases in which it might, upon the evidence, have been treated as an element in the inquiry; and that *the severance of the chain of causation is almost invariably assumed to be a rigid inference of law which takes effect as soon as it is shown that the injury proximately resulted from the negligence of a co-servant.*

Now, the negligence of the engineer and conductor of No. 3, in ignoring the orders given caused the hurt. But that negligence up to the time of passing Yucca (if they were negligent, which we dispute) did not cause nor contribute to the injury. At Yucca No. 3 was, at the most, two minutes ahead of time. Had it continued only two minutes ahead of the time the accident would not have occurred, for in that case it would not have reached Franconia till 5:15 before which time plaintiff would have been safely on the siding and out of harm's way. For it will be noted that the collision occurred at between 5:12 and and 5:13 at a mile and a quarter west of the middle of a half mile long siding, or only a mile west of the west end of the siding (Tr. p. 32, fol. 61.) Plaintiff says he had plenty of time—would have been on the siding in a minute and a half; would have had three and a half minutes to spare (Tr.

p. 24, fol. 45, p. 26, fol. 49). This too was the conclusion reached by the trial court:

> "Plaintiff but for said collision could have reached and placed his train number 4 on said siding within two or three minutes thereafter, and this would have been *two or three minutes before number 3 was due at said station.*"

It was the gain of four minutes made by number 3 between Yucca and Franconia that caused the wreck. The supposed gain of two minutes on the way to Yucca had nothing to do with the accident. *It would have happened just the same had Williams passed Yucca at* 4:57 *instead of* 4:55, and it would not have happened had he kept to his running time and only two minutes ahead of his schedule after passing Yucca.

Now, with respect to the fact that Williams was two minutes ahead of time at Yucca the plaintiff can make no complaint, since that excess caused him no hurt. Plaintiff therefore, cannot complain that the train dispatcher took no action as to that act of Williams.

What, then, is the complaint? It must be that the dispatcher ought to have anticipated that Williams, because he was two minutes ahead of time at Yucca, would be six minutes ahead at Franconia.

Defendant is not bound to anticipate negligence on the part of its employes. How, then,

can it be bound to anticipate more negligence from less? or that because an employe has exceeded his orders up to a certain point he will thereafter still further exceed them? The Circuit Court proceeded on the theory that No. 3 passed Yucca at 4:55 instead of 4:57; that this was known to the dispatcher in time to have given a stop order at Franconia; that the dispatcher was a vice-principal. And the court's conclusion was that the failure to give the order was actionable negligence toward plaintiff. The court did not state any reason for this conclusion, unless what he so found to be the facts furnish the reason.

The Circuit Court of Appeals assumed the same facts and concluded that the dispatcher was negligent because he failed to give further orders after "it became apparent that a known failure to comply with orders already made was likely to or might result in disaster." But, as we have shown, no failure known to the dispatcher did cause or have any part in causing the disaster. It was the gain made after passing Yucca that brought on the wreck, not the gain (if any) up to that point, a gain that could have been maintained with entire safety, as the facts actually existed.

If No. 3 had simply maintained its assumed lead of two minutes betwen Yucca and Franconia and so had passed No. 4 in safety at that point, the failure of the train dispatcher to stop No. 3

at Franconia and hold it to its time would not have been negligence so far as the company's employes on No. 4 were concerned, because no damage would have resulted. It could not have been made the basis of any suit for damages. It became injurious only because the engineer and conductor of No. 3, responsible agents, committed an independent, unforeseen and improbable act of negligence between Yucca and Franconia of which the train dispatcher did not or could not know until after No. 3 had passed the last named station.

Wharton, at section 145 of his volume on Negligence, says that subsequent negligence is not a bar if it was likely in the usual and natural order of things to follow from the defendant's negligence. But to bring this case within that exception it would be necessary for the court to hold that the negligence of Williams, the engineer, in disregarding his orders so as to gain four minutes in passing from Yucca to Franconia, was likely in the usual and natural order of things. But to hold that would amount to holding that the master must anticipate negligence on the part of his servant, which is contrary to a well-established rule; or, at least, it would be necessary to hold that because Williams had exceeded his orders by two minutes up to the time he passed Yucca the master should have anticipated that he

would further and to a greater degree disregard his orders after passing that station. Now, there can be no more reason for anticipating continued negligence or, rather, increasing negligence, than for anticipating negligence at all, and if the rule were to be laid down that the master must anticipate further negligence if he knows that the servant has once been negligent, the whole doctrine as to the master's liability for retaining incompetent servants would be changed. As it now stands a master is not liable as for retaining an incompetent servant merely because he knows that the servant has once been negligent. But if you say that because the servant has once been negligent the master must anticipate that he will again be negligent or be further negligent, then the master's only possible defense is to discharge a servant for the first act of negligence and never re-employ him.

It may be suggested that the train dispatcher's negligence was the last act of negligence preceding the accident. Perhaps it was so in point of time, but the sequence of events in determining the proximate cause is not determined by time. His negligence must be viewed from the standpoint of the actors. His information of the fact that the engineer had disregarded his schedule was received at about 4:58. It was received before that further act of negligence occurred

whereby the engineer gained the last four minutes in excess of his schedule time. The train dispatcher's knowledge extended only to the gain of two minutes. Therefore, from the standpoint of the persons engaged in the transaction, the train dispatcher's negligence, if any, preceded the negligence of the engineer on his way from Yucca to Franconia which brought about the accident. Really, therefore, the engineer's negligence was, speaking in a proper sense, subsequent to the negligence, if any, of the dispatcher; and really intervened between the negligence of the dispatcher and the injury.

Richmond v. Tribble's Administrator; 97 Va., 495; 24 S. E. 278.

In Union Pacific Co. v. Calaghan, 56 Fed. 988, the Circuit Court of Appeals, Eighth Circuit, Judge Sanborn, said:

> "It must also be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces. In sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause and yet subordinate to and often themselves influenced if not produced by it. Thus a defect in the construction of a boiler or an engine may long exist without harm, and yet finally be the proximate cause of an explosion to which the negligence of an engineer or climate, and many other incidental causes

nearer by years to the effect may contribute."

It is true that the question of proximate cause is often one of fact; but conceding (as we do for the purpose of this part of our argument) all the facts, with reference to the excess of speed and notice thereof, to be as claimed by the defendant in error, the question of cause is clearly one of law.

Ry. Co. v. Trich, 117 Pa. St. 300; 11 Atl. 627;

Hoag v. Ry. Co. 85 Pa. St. 293.

We apologize for so long a brief on a matter involving no question arising under the constitution or laws of the United States. We did not seek the federal jurisdiction, but being brought here we urge our rights. Nor is the case one of little importance, although it does involve none of those questions on which it is the peculiar province of this court to speak the final word. Mr. Hemenway in a recent address before the American Bar Association said: "It has been recently stated by one who has a wide experience on the bench of the Superior Court of Massachusetts that 'the provisions of the Statutes relating to the employers' liability furnish grounds for probably one quarter of the civil jury cases tried in court at the present day. This percentage is not normal.'" Am. Law Rev., Vol. 39, p. 655. It

is important that so far as possible the law be settled and that employers may know when they have performed their duty to their employes; may know at what point their legal duty ends and the execution of orders rests with those who stand as fellow-servants.

We submit that in this case there is absolutely nothing to show a breach of duty by employer to employee, and that the judgment ought to be reversed.

Dated Feb. 21, 1906.

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